

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001834-MR

COMMONWEALTH OF KENTUCKY,  
DEPARTMENT OF MILITARY AFFAIRS,  
JOHN R. GROVES, JR., APPOINTING AUTHORITY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 00-CI-00349

DON E. LIVINGSTON AND  
COMMONWEALTH OF KENTUCKY,  
PERSONNEL BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING  
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BEFORE: GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Department of Military Affairs (the "Department") appeals from a judgment of the Franklin Circuit Court overruling a decision of the Kentucky Personnel Board (the "Board") that appellee, Don E. Livingston ("Livingston"), was not penalized when reverted to his previous employment position and salary because his promotion was void *ab initio*. The circuit court ruled that the Board's decision was arbitrary and not supported by substantial evidence. After a review of the record

and the applicable law, we reverse and remand this matter to the circuit court for an order reinstating the Board's decision.

On October 1, 1995, the Department promoted Livingston from the position of helicopter pilot to helicopter pilot chief. Mark Clements, a rival applicant for the chief position, appealed Livingston's promotion to the Board. By final order dated June 16, 1996, the Board found that the Department failed to prove that it complied with 101 KAR 1:400 Section 1(1), which requires consideration of the qualifications, records, performance, conduct, seniority, and performance evaluations of each candidate. The Board declared Livingston's promotion void *ab initio* and ordered Livingston restored to his prior position and pay rate.

The Department, by letter dated June 26, 1996, notified Livingston that he was being demoted pursuant to the Board's order. Livingston appealed this action to the Board. Meanwhile, the Department eliminated the chief's position.

On December 17, 1996, the Board entered a final order holding that the June 16, 1996, order did not prohibit the Department from paying Livingston a higher rate of pay and that the Department should determine his appropriate salary. The Board also dismissed Livingston's request to be reinstated as helicopter pilot chief. This order was based solely upon the recommendations of the hearing officer, who failed to conduct an evidentiary hearing.

Livingston appealed the December 17, 1996, order to the Franklin Circuit Court. The circuit court reversed the Board's

order and remanded the case for an evidentiary hearing. The evidentiary hearing was held on December 9, 1999. At the hearing, the hearing officer heard testimony from Roger Green, Dale Shelton, and Livingston. Mr. Shelton's testimony was the most relevant evidence for this appeal.

Mr. Shelton, the director of the Division of Classification and Compensation for the Personnel Cabinet, testified that the Board's order of December 17, 1996, provided the Department with only two options concerning Livingston's employment status. The Department could either completely void all of Livingston's personnel actions, including his promotion, or involuntarily demote Livingston and reduce his salary. According to Mr. Shelton, reversions were used when career employees were removed from unclassified positions and returned to classified service or when classified employees were promoted but performed unsatisfactorily during their promotional probation. After the six-month probationary period passed, reversion was not possible. Mr. Shelton testified that Livingston completed the six-month probationary period.

On cross-examination, Mr. Shelton acknowledged that an employee could be demoted without a reduction in pay. In Livingston's case, however, Mr. Shelton testified that the reduction in pay was carried out by the Department pursuant to the Board's June 1996, order. Absent the Board's June 1996, order, Livingston could have been removed from the chief's position without losing any pay by transfer, promotion or

demotion. Yet, the Board's order deprived the Department of these options.

On February 14, 2000, the Board ordered that the documentation in Livingston's personnel file be amended to reflect that Livingston was reverted to the helicopter pilot classification. The Board further adopted the hearing officer's findings that, pursuant to Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406 (1994), Livingston was not penalized because of the Board's actions since he had no right to a promotion that was void *ab initio*. Livingston appealed to the Franklin Circuit Court.

On July 24, 2001, the trial court entered an opinion and order overruling the Board's decision. The circuit court held that the Board's decision was arbitrary and not supported by substantial evidence. Further, the trial court held that Bowling was not applicable in this matter because Livingston was, in fact, penalized because of an ordered salary adjustment. This appeal followed.

The appellate courts of this Commonwealth have, with specificity, defined how courts must review findings of administrative agencies. In reviewing a decision by an administrative agency, the reviewing court is "bound by the administrative decision if it is supported by substantial evidence." Commonwealth Transportation Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). Thus, "[i]f there is any substantial evidence to support the action of the administrative

agency, it cannot be found to be arbitrary and will be sustained." Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970).

Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Bowling, 891 S.W.2d at 409. When determining whether an administrative agency's decision is supported by substantial evidence, the reviewing court must defer to the principle that the trier of fact "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." Id. at 410. An agency's decision may be supported by substantial evidence even though a reviewing court may have arrived at a different conclusion. Id. Furthermore, if an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record." Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Simply put, "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." Cornell, 796 S.W.2d at 594.

If an agency decision is supported by substantial evidence, the reviewing court must then determine whether the agency applied the correct rule of law to its factual findings. Bowling, 891 S.W.2d at 410; Commonwealth, Department of Education v. Commonwealth, Ky. App., 798 S.W.2d 464, 467 (1990), citing H & S Hardware v. Cecil, Ky. App., 655 S.W.2d 38, 40 (1983). "If the court finds the correct rule of law was applied to the facts

supported by substantial evidence, the final order of the agency must be affirmed." Bowling, 891 S.W.2d at 410.

In this matter before us, we believe that the Board's decision is supported by substantial evidence and that the Board applied the correct rules of law to its findings. First, the parties stipulated that Livingston was not lawfully promoted. In fact, the record shows that Livingston provided no evidence or disputed that his promotion was not void *ab initio*. Thus, since Livingston's promotion to helicopter pilot chief was void, he never attained status in that classification, had no property rights therein, and could have been removed.

There is also substantial evidence to support the fact that Livingston was not demoted. KRS 18A.005(11) defines demotion as a "change in the rank of one employee from a position in one (1) class to a position in another class having a lower minimum salary range or less discretion or responsibility." However, inherent in this definition is the premise that, before an employee can be changed to different positions in different classes, the employee must have been legally placed in the higher classification. Here, Livingston was never legally placed in the helicopter pilot chief classification. The promotion was rescinded and declared to be void *ab initio*. Thus, any action moving Livingston from the helicopter pilot chief class to the helicopter pilot class fails to satisfy the definition of demotion.

Third, the record reflects that the Board chose not to believe Mr. Shelton's testimony that because Livingston completed

the six-month probationary period, reverting him to the helicopter pilot position was not possible. However, pursuant to KRS 18A.005(32), a reversion occurs when a status employee is returned "to his or her last position held in the classified service" or the status employee "fails to successfully complete promotional probation." Here, the Board simply used reversion to return Livingston, a status employee, to the last position that he lawfully held. This was properly done since Livingston could not successfully complete a promotional probation when he was never legally promoted to the position of helicopter pilot chief. Therefore, Livingston's reversion to helicopter pilot was proper.

Finally, we disagree with the trial court's unpersuasive finding that Bowling does not control this matter because Livingston was, in fact, penalized. Rather, we believe that Bowling is exactly on point with this case because it directly addresses and rejects Livingston's argument that he was penalized. In Bowling, this Court stated:

Alsip's argument that the Board's action in rescinding her promotion constitutes a penalization of her as a demotion under KRS 18A.005(8) is unfounded. The result of the Board's ruling is that Alsip's promotion to administrative secretary was void ab initio. Alsip cannot claim legal entitlement to a promotion that was made illegally.

Bowling, 891 S.W.2d at 411.

Here, Livingston's rights in the position of helicopter pilot chief were null and void. This finding eliminated any claim of right Livingston may have possessed concerning that promotion. On appeal, Livingston does not dispute that finding. Therefore, since Livingston cannot claim legal entitlement to the

chief's position, he cannot be penalized because he was reverted back to the proper employment position. The effect of the Board's order was to place all of the parties in the same position that they were prior to the improper promotion. We feel that the Board's decision obtained the correct result.

Accordingly, we reverse the Franklin Circuit Court's order reversing the Kentucky Personnel Board, and remand this case to that court for entry of a judgment reinstating the Board's decision.

ALL CONCUR.

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